

**SIXTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA**

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Case No. 6D23-323  
Lower Tribunal No. 2022-01710

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CARRIE LYNN LUFT,

Appellant,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
FLORIDA REAL ESTATE COMMISSION,

Appellee.

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Appeal from the Department of Business and Professional Regulation.

June 9, 2023

COHEN, J.

This appeal is from the denial of Carrie Luft's application for a real estate license by the Florida Real Estate Commission.<sup>1</sup> We have jurisdiction. Art. V, § 4(b)(2), Fla. Const.; §120.68(2)(a), Fla. Stat. (2022).

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<sup>1</sup> This case was transferred from the Second District Court of Appeal on January 1, 2023.

Luft lost her license in 2014. In 2021, she applied for a new license. The commission sent her a letter saying that it intended to deny her a new license because her previous license had been revoked. She requested and obtained a hearing to have the commission further consider her application. At that hearing, Luft made her presentation, at which she focused more on the validity of the earlier revocation than on her current fitness to hold a license. There was some evidence presented on the latter.

When determining whether an applicant should be granted a license, the commission is governed by section 475.17(1)(a), Florida Statutes (2021), which provides:

An applicant for an active broker's license or a sales associate's license must be competent and qualified to make real estate transactions and conduct negotiations therefor with safety to investors and to those with whom the applicant may undertake a relationship of trust and confidence. If the . . . applicant's registration or license to practice or conduct any regulated profession, business, or vocation has been revoked . . . the applicant shall be deemed not to be qualified unless, because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration . . . .

In other words, even though Luft's license had been previously revoked, she was entitled to have the commission consider whether, after the passage of seven years without a license, she could have a new one "because of lapse of time and subsequent

good conduct and reputation,” or any other reason the commission might find “sufficient,” she did not present a danger to the public or investors.

Notwithstanding that statutory provision, when it was time for the commissioners to deliberate on her application, the commission’s legal advisor from the attorney general’s office advised the commission that it did not have the authority to grant Luft’s application. Counsel told the commission that it was bound by the terms of section 455.227(5), Florida Statutes (2021), which reads:

In the event the board, or the department when there is no board, determines that revocation of a license is the appropriate penalty, the revocation shall be permanent. However, the board may establish, by rule, requirements for reapplication by applicants whose licenses have been permanently revoked. Such requirements may include, but shall not be limited to, satisfying current requirements for an initial license.

Section 475.17(1)(a) was never mentioned.

When the question of the commission’s authority arose, the following discourse ensued:

CHAIR SCHWARTZ: We have a legal advisor from the Attorney General's Office and --

MR. HARRIS (Asst. Atty Gen.): Look --

CHAIR SCHWARTZ: How much of our hands are tied? If our hands are tied, they're tied.

MR. HARRIS: How much do you want to gamble? I mean, honestly. And I'll tell you why. So you've got

[section 455.227(5)]. The statute is very clear. It says revocation is permanent.

When counsel was asked what would happen if the commission approved Luft's application, counsel replied:

Here's what would happen. One of two things would happen. Either (a) what I would -- what I always tell my Board members is if you act contrary to a statute . . . the risk you have is that you approve the applicant and that applicant then, down the road, does something really really bad. Let's say a physician. A physician gets licensed against statute. Physician goes and kills a bunch of patients. Gets sued for malpractice and the defense lawyer says, oh, let's look at the licensing. Oh, this person should never have been licensed. Licensing Board, you now have some responsibility for the fact that had you not licensed this person, these people wouldn't have been killed, so you're now somehow responsible. And you, as a Board, or you as individuals could get pulled into that and the allegation would be that you should have never license this person. By doing that, you violated the statute and therefore it's your fault, in some way, that people died. And that would be a mess. Likewise, the other thing realistically that would happen is you grant somebody, you grant somebody else, you grant a third person, you deny the fourth person. The fourth person appeals. Says this is a non-rule policy. They're just duck-duck-goosing. That's illegal, can't do it. The court says you're right, you can't do that. But then would they overturn that one and say because you gave three people you have to give it to the fourth person. Or would they say you're not allowed to do it for anybody. . . . The strongest thing for you to do is to just stand on the statute and . . . and let somebody appeal.

CHAIR SCHWARTZ: And then we have a statute that is clear, but has been held unconstitutional someplace else. . . But it's still on the books.

MR. HARRIS: It's still on the books . . . and the easy thing, as a lawyer, is to tell you the statute is clear. The statute says revocation is permanent revocation . . . Period.

Counsel concluded this segment of the discussion with, “So legally my advice to you all is to never reinstate a license that has been revoked, ever, the statute says what it says, and let a court tell you that you were wrong.”

They were wrong. Section 475.17(1)(a) clearly provides the commission that authority. Section 455.227(5), a statute of dubious constitutionality, *see Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26 (Fla. 1st DCA 2008), is a statute applicable to business regulation, generally, and that statute must give way to section 475.17(1)(a), which is specifically written to apply to applications for real estate licenses.

To paraphrase, the commission asked its counsel from the attorney general’s office whether it had the authority to grant Luft a license. Counsel’s response was that the commission should “never reinstate a license that has been revoked, ever.” If the commissioners granted a license to someone whose license had previously been revoked and something bad happened later, the commissioners might be individually sued for the consequences. A commissioner moved that Luft’s application be denied because of Luft’s prior revocation, and that motion carried.

Section 120.68(7), Florida Statutes (2022), provides:

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

\* \* \*

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

\* \* \*

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action.<sup>2</sup>

Can it be any clearer that the commissioner's judgment was governed by an erroneous view of the applicable law and that the procedure the commission followed was procedurally flawed?

This case is remanded to the commission for purposes of a new hearing at which the focus for Luft and the commission will be clearer. It is not to relitigate the now nine-year old revocation, but for both Luft and the commission to examine Luft's current fitness to hold a real estate license.

REVERSED and REMANDED.

SMITH, J., concurs.

NARDELLA, J., dissents, with opinion.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING  
AND DISPOSITION THEREOF IF TIMELY FILED

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<sup>2</sup> The particular action compelled is to conduct a hearing at which the commission exercises its discretion and applies the correct law in its decision.

NARDELLA, J., dissents, with opinion.

Carrie Lynn Luft (“Luft”) appeals a final order of the Florida Real Estate Commission (“the Commission”) denying her application for a real estate license. Because Luft does not present a legal argument that supports reversal, I would affirm. As a result, I respectfully dissent.

### FACTS AND PROCEDURAL HISTORY

To understand the issue presented on appeal, it is first necessary to discuss the relevant proceedings that occurred in 2014, which are not at issue in this appeal.

Luft once held a real estate license in the State of Florida. In late 2012, while holding her license, Luft moved into the vacant house of a client while assisting the client with the sale of the property. The house eventually sold, but Luft failed to vacate the property after closing, causing the buyer to file an ejectment action against her, for which she was found liable. In addition, the buyer filed a complaint with the Department of Business and Professional Regulation (“the Department”) alleging Luft violated section 475.25(1)(b), Florida Statutes (2013), by breaching the public trust in a business transaction.

Shortly before the issuance of the Administrative Complaint, Luft told an investigator she was “leaving the country due to family and health matters and was concerned on being contacted should [the Commission] move forward with a formal complaint.” She indicated that she would have limited access to the internet and

would not have a specific address, and she did not provide the Department with a way to reach her.

Not surprisingly, service of the Administrative Complaint was unsuccessful, so a notice of action was placed on the Department's website for four weeks. Luft never responded. As a result, the Commission held an informal hearing, in accordance with section 120.57(2), Florida Statutes (2014), which Luft did not attend. The Commission issued a final order revoking her license and notifying Luft of her appellate rights. Luft did not appeal.

This brings us to the present. In April of 2021, Luft filed an application to become a licensed real estate agent. At an initial hearing, and when questioned about the ejectment from seven years before, Luft explained:

I was already living there and my niece had come down from up north. . . . And, you know, things – the new purchaser was my friend and – but things just – total misunderstandings, miscommunication, and going back and forth. You know, Carrie, yes, you can stay. No, you can't. Yes, you can. And, finally, I said to her, you know what, why don't we just get a mediator and figure out something that works for both of us because I'm kind of stuck between a rock and a hard place. Now, you're giving me a couple of weeks' notice here and I've got my niece down and it's the middle of season, you know, and I'm trying to close up on these deals and stuff.

So, anyway, she just turned around and hired an attorney and just decided to evict me . . . .

After this recounting of events, one commissioner commented: "I actually, in reading this case, remember it because I was on the Commission at the time, and I



find it to have been a significant breach of the trust that people put in us with a license.”

The Commission issued a Notice of Intent to Deny Luft’s application under sections 455.227(1)(f) and 475.25(1)(s), Florida Statutes (2021). Thereafter, Luft filed a Petition challenging the Notice of Intent.

In the proceedings that followed, Luft argued that her license was wrongfully revoked in 2014. Specifically, her petition requested “reversal or modification of FREC’s disciplinary action of ‘revoking’ this Applicant’s real estate license due to circumstances beyond her control and for . . . the lack of due process by not providing the complaint as well as the hearing date and time to Applicant.” In addition, Luft asserted an “affirmative defense” that the Commission “ignored the mandates of Sections 475.181 and 475.17(1)(a), Florida Statutes, which require that findings of facts be based on the applicant’s good character and rehabilitation which were never even addressed or considered in the hearing.”

Thereafter, the Commission held an informal hearing. At the hearing, Luft again argued that she should be granted a license due to an improper revocation because “she never received notice of the Commission meeting where her license was revoked.” Her argument focused on what she perceived to be procedural irregularities that occurred in 2014. With the argument framed that way, a discussion ensued regarding the finality of administrative proceedings. For example, one commissioner commented that she perceived the issue before them as whether they

would revoke the license that day “under the circumstances that presented itself nine years ago.” This resulted in the commissioners seeking input of the Commission’s attorney, who advised that they should “never reinstate a license that has been revoked, ever, the statute says what it says, and let a court tell you that you were wrong.” Despite this advice, the attorney also reminded the Commission of a recent scenario where they had approved an applicant who had a previous license revoked based on their decision that “administrative finality didn’t apply.”

After much back and forth, a commissioner made a motion to deny Luft’s application because, “as a result of all of the testimony and argument that’s been made, there has been no change that would warrant a departure from the Notice of Intent to Deny.” The motion passed three to two.

A final order was entered on February 11, 2022, based on Luft’s prior revocation. The final order, citing to sections 455.277(2)(a) and 475.25(1)(s), Florida Statutes (2021), indicated “the Commission may deny” the application on the basis that she had her “prior license or registration acted against.”

### STANDARD OF REVIEW

We review the Commission’s findings of facts for whether they are supported by competent, substantial evidence and determinations of law de novo. *Porras v. Univ. of Fla.*, 337 So. 3d 471, 473 (Fla. 1st DCA 2022); *Rodriguez v. Dep’t of Bus. & Prof’l Reg.*, 326 So. 3d 796, 798 (Fla. 3d DCA 2021).

## ANALYSIS

On appeal, Luft presents, as she characterizes it, “one distinct issue.” Specifically, she argues “[j]ustice requires that the Court remand this case back to the Florida Real Estate Commission to make specific findings as to whether the applicant is ‘honest, truthful, trustworthy, and of good character; and [that she currently] have a good reputation for fair dealing’” as contemplated by section 475.17(1)(a), Florida Statutes (2021).

However, Luft cites no authority supporting her argument that the Commission is required to make specific findings as to whether an applicant is honest, truthful, trustworthy, of good character, and has a good reputation for fair dealing—nor is there such a legal requirement. So, I would affirm on this basis alone.

Furthermore, to the extent that Luft’s argument is based on the Commission’s mistaken understanding of the law, that argument also fails. Notably, her argument in this regard is not based on any error in the final order—nor could it be, as the order cites a valid legal basis for denial, and its factual findings are supported by competent, substantial evidence. Instead, Luft’s argument is based entirely on discussion that occurred between a few commissioners and the Commission’s counsel at the final hearing. With this argument, she fails to identify a legal basis that would permit this court to reverse an otherwise legally sufficient final order based on the comment of one commissioner or the Commission’s counsel. To the

contrary, there is no requirement that each commissioner state their reasoning and/or identify every issue they did or did not consider. The Commission takes action as a single entity, and that action is determined by a majority of votes. *See, e.g., Fla. State Bd. of Health v. Lewis*, 149 So. 2d 41, 43 (Fla. 1963) (“The individuals collectively constitute the Board.”). The majority vote is the decision, and each commissioner may have a different reason for voting the same way.

Additionally, at no point during the hearing did Luft argue, as she does on appeal, that, “because of lapse of time and subsequent good conduct and reputation, or other reason deemed sufficient, it appears to the commission that the interest of the public and investors will not likely be endangered by the granting of registration.” Instead, Luft essentially requested that the Commission re-evaluate the 2014 revocation and reach a different conclusion. She did this by attempting to relitigate the 2014 events, rather than by presenting any interceding facts. It was in the context of this argument that the discussion between the commissioners and the Commission’s counsel regarding the propriety of revisiting the 2014 decision arose. For these reasons, Luft does not demonstrate a procedural error based on the discussion at the hearing.

Finally, to the extent the Commission erred by not explicitly addressing section 475.17(1)(a), the error was harmless. *See* § 120.68(7)(c), Fla. Stat. (2021); *Dep’t of HRS v. Wright*, 439 So. 2d 937 (Fla. 1st DCA 1983) (noting procedural errors are subject to “statutory harmless error” analysis as the statute provides for

remand only where material error in procedure in administrative proceeding impairs fairness of the proceeding or correctness of action taken). Both the commissioners and the Commission's counsel discussed circumstances under which they would grant a license to an individual who had a license previously revoked. In addition, the final order indicated that the Commission "may" deny based on the prior revocation. In addition, the record indicates that Luft's supporting documentation, including letters of recommendation were before the Commission. The Commission's chair also inquired as to what Luft had been doing since her license was revoked, including whether she had any criminal activity. And the motion that was ultimately adopted specifically stated: "there has been no change that would warrant a departure from the Notice of Intent to Deny."

In sum, Luft's application was properly denied under the authority of sections 455.227(1)(f) and 475.25(1)(s), Florida Statutes (2021). As Luft presents no argument that supports reversal, I would affirm.

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Khairiya C. Bryant, of KCB Law, PLLC, Orlando, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Marlene K. Stern, Senior Assistant Attorney General, Tallahassee, for Appellee.